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MOTION TO DISMISS APPEAL.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 868.

THE COMMONWEALTH OF KENTUCKY, Appellant,

vs.

CALEB POWERS.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 898.

THE COMMONWEALTH OF KENTUCKY, ... *Appellant,*

vs.

CALEB POWERS, ... *Appellee.*

MOTION TO DISMISS APPEAL.

Now, comes the appellee, Caleb Powers, and moves the Honorable Court to dismiss the appeal herein (same being an appeal from an order of the United States Circuit Court for the Eastern District of Kentucky, made and entered on July 7, 1905, in the case of Commonwealth of Kentucky vs. Caleb Powers, granting and directing the issual of a writ of *habeas corpus cum causa* commanding the jailer of Scott County, Kentucky, to deliver said Caleb Powers into the custody of the marshal of said United States Circuit Court—see pages 241 and 242 of printed record of the appeal) because it has no jurisdiction of the appeal; and for grounds states as follows:

1st. Because the appeal herein does not involve the jurisdiction of said Circuit Court as a Federal tribunal as contemplated by the Judiciary Act of March 3, 1891, and by Section five (5) thereof.

2d. Because the said order, herein appealed from, is not a *final* order or judgment of said United States Circuit Court, within the intent and meaning of the laws of the United States, and the decisions of this Honorable Court; and the appeal

herein taken is, therefore, not authorized by said Section five (5) of said Judiciary Act of March 3, 1891, or by any other statute or law of the United States.

3rd. Because if a review of this cause by this Honorable Court, were permissible, the cause, being one *at law*, could not be brought here by *appeal*, but only by *writ of error*.

The foregoing motion is based on the following facts:

On 17th of April, 1900, the grand jury of Franklin County, Kentucky, returned an indictment against the defendant, Caleb Powers, charging him with the crime of being accessory before the fact to the willful murder of William Goebel. Copy of the indictment is attached to and made part of petition for removal hereinafter named, and said indictment is copied into the record of the appeal herein (pp. 25–26, printed record). In March, 1900, and prior to the return of said indictment, the said Powers, under a warrant issued by the county judge of Franklin County, Kentucky, charging him with the commission of said offense, had been placed in the custody of the State of Kentucky, and in that custody continuously remained until the 10th day of July, 1905, when, agreeably to the order of the United States Circuit Court for the Eastern District of Kentucky, herein appealed from, he passed into the custody of the United States marshal for said Eastern District of Kentucky, in which last named custody he has ever since remained.

On the 2d day of May, 1900, the said indictment was, on application of appellee, transferred to the Scott Circuit Court at Georgetown, Kentucky, for trial.

Since the transfer, said Powers has been tried under said indictment three times, and found guilty at each trial by the verdict of a jury. At each of the first two trials, his punishment was fixed at confinement in the penitentiary for life; at the third trial, it was fixed at death. The trial court entered judgment on each verdict. From each one of these judgments, an appeal was taken to the Kentucky Court of Appeals, and each judgment was reversed by that court. The reasons for each reversal can be found in the reported opinions:

110 Kentucky Reports, page 386;

114 *Id.*, page 237;

26 Kentucky Rep'r, page 1111.

On May 3, 1905, an order was entered by said Scott Circuit Court fixing July 10, 1905, as a date for the fourth trial of the case. At the same time, appellee filed in said Scott Circuit Court his petition, based on Section 641, Revised Statutes of the United States, for the removal of the prosecution from

said State court to the United States Circuit Court for the Eastern District of Kentucky, for final trial. A duly certified transcript of the record was thereupon, on the 8th day of May, 1905, filed in said United States Circuit Court, sitting in London, Kentucky, and a motion was then and there in said last-named court entered on behalf of appellee for an order to be made by said United States Circuit Court directing the clerk of said court to issue a writ of *habeas corpus cum causa*, as provided for by Section 642, of said Revised Statutes, and for the purpose in said section named.

So much of said Section 641 as was applicable to said motion, is as follows:

> "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, * * * such suit or prosecution may, upon the petition of such defendant filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending."

And the whole of Section 642 is as follows:

> "When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said Circuit Court to issue a writ of *habeas corpus cum causa*, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said Circuit Court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."

The facts and grounds on which appellee based his right of removal were fully set out in said petition for removal, and were, as stated in said petition, substantially as hereinafter

shown. The said petition was composed of two paragraphs, the first of which, stripped of technical verbiage, charged as follows:

That defendant, said Caleb Powers, was arrested and was, when said petition was filed, in the custody of the State of Kentucky, under said indictment charging him with the aforesaid offense; that defendant was then and there within the jurisdiction of and was a citizen of the United States and of the State of Kentucky, and as such citizen was entitled to and entitled to enforce in the judicial tribunals of Kentucky all equal civil rights and the equal protection of the laws secured to him by the Fourteenth Article of Amendment to the Constitution of the United States, by Section 1977 of the Revised Statutes of the United States, and by Act of Congress of March 1st, 1875; that subsequent to his arrest, to wit, on the 10th day of March, 1900, William S. Taylor, who was then the duly and legally elected, qualified, actual and acting Governor of Kentucky, and had in his possession and under his control the office and executive mansion prepared by, and belonging to, said State for its Governor, and all the books, papers, records and archives belonging thereto, granted and delivered to defendant a full and complete, absolute and unconditional pardon, release and acquittance of the identical charge against him in said indictment; that said Taylor, at the time he granted said pardon, had the right and authority, under the Constitution and laws of Kentucky, to grant same; that defendant accepted said pardon, and had ever since claimed, and then and there claimed, the full benefit thereof and his liberty thereunder; that, on the day said pardon was granted him, it was, by said Taylor, duly entered on the executive journal kept in his office and the certificate thereof was duly and in due form of law, and as required by law, issued and delivered to defendant, and defendant accepted such certificate; that, at the time said pardon was granted to him by said Taylor and subsequent thereto, the said Taylor was, and prior thereto had been, recognized, regarded, and treated as the duly elected, actual, and acting Governor of the State of Kentucky by the executive power and Executive Departments of the United States, including the President, the Attorney-General, the Postmaster-General, and the Postmaster at Frankfort, Kentucky; that, for said State to hold defendant in custody or to require him to be tried in any one of its courts for said offense since the granting and acceptance of said pardon and the certificate thereof was a denial to defendant of the equal protection of the law and of the equal civil rights to which he was entitled under and by virtue of said Article of Amendment to the Constitution

of the United States, and by said section of said Revised Statutes and by said Act of Congress; that, notwithstanding the granting and acceptance of said pardon and certificate and the fact that said Taylor was the Governor of Kentucky when same was granted and issued and was recognized as such Governor by said executive officers of the United States, as aforesaid, defendant could not procure his rights thereunder, or enforce in said Scott Circuit Court, or in any court or judicial tribunal in Kentucky, the equal civil rights and equal protection secured to him by said Amendment and laws, based on said pardon and certificate, for the reason now to be stated:

That, at each of said trials, defendant presented to said State court said certificate of pardon, and plead and offered in evidence said pardon and said certificate as a bar and complete defense to said prosecution, but at each of the trials the trial court overruled said offer and plea and refused to admit said pardon and certificate as evidence, and held and adjudged that said pardon and certificate were null and void and of no effect whatever; all of which was duly excepted to by defendant. That the holding of the court in the respect just named was one of the grounds upon which each of said three appeals was taken; that on the trial of each one of said appeals defendant contended that said pardon and certificate entitled him to an acquittal of and discharge from the charge in said indictment; but the Court of Appeals, on the trial and final disposition of each one of said appeals, failed and refused to hold that said pardon and certificate authorized defendant's acquittance of said charge; instead, that court, as the trial court had done, held that the said pardon and certificate were and are null and void and of no effect whatever.

That the holding of said Court of Appeals on the trial of each one of said appeals was reduced to writing, and by the official reporter of that court caused to be printed in, as a part of, and same is now, a part of the official printed reports of said Appellate Court; that all of said holdings are in full force and effect and are the laws of Kentucky in said case, and are binding upon and will have to control said State court in all future trials of said case.

That the instances named are the only instances in which said Court of Appeals, or any trial court of said State, ever held any pardon and certificate thereof, granted, entered and issued by any Governor of Kentucky, to be void and of no effect.

That should said case be re-tried in the State court, that court could not, under the *laws of Kentucky*—the said reported decisions—allow defendant to plead or introduce said pardon

or certificate as a defense to the charge contained in said indictment, and could not allow defendant his liberty and acquittal under and by virtue of said pardon and certificate, or allow said pardon and certificate to have any effect whatever in defendant's behalf, but instead would be bound, in consequence of said reported decisions, to hold said pardon and certificate to be null and void and of no effect whatever.

A duly certified copy of said pardon and a certified copy of the record upon the executive journal of the Governor of Kentucky, showing that the same was granted and issued, as above set out, were filed and made a part of the petition for removal. (See pp. 27 and 28, printed record, for same). A certified copy of the warrant under which defendant was arrested was also made a part thereof (p. 31, printed record).

The second paragraph of said petition for removal set forth, in substance, that the defendant was and always had been a citizen of the United States and of the State of Kentucky, and that he was then and had always been within the jurisdiction of the United States and of the State of Kentucky; that as such citizen he was entitled to enforce in the courts of Kentucky, on the trial and final disposition of the indictment charging him with being accessory before the fact to the wilful murder of William Goebel, all equal civil rights and the equal protection of the laws secured to him by the various Federal constitutional and statutory provisions hereinbefore enumerated. That he was then and there denied and could not enforce in the courts of the State, and in the courts in that portion of the State where said prosecution was pending, the rights secured to him by said constitutional and statutory provisions of the United States, in that the State of Kentucky has enacted into law, which was then and there (and is now) in force, Section 281 of the Kentucky Crim. Code of Practice, which section provides as follows:

> "The decisions of the court (the trial court), upon challenges to the panel (*a*), and for cause (*b*), upon motion to set aside an indictment (*c*), and upon motion for a new trial (*d*), shall not be subject to exception;"

and in that the Kentucky Court of Appeals, the court of last resort in the State, has, by three decisions in said prosecution, and by other decisions, upheld the validity of said Section 281, notwithstanding its plain contravention of the said provisions of the Federal Constitution. That all of said decisions of said Court of Appeals have been duly promulgated by said court, and the said holdings have become, and are now, the law of the State of Kentucky in this case.

That defendant was indicted on the aforesaid charge on April 17th, 1900, by the grand jury of Franklin County, Kentucky, in the Franklin Circuit Court, as set out in said first paragraph. That he was, on May 3d, 1900, granted a change of venue from said Franklin Circuit Court to the Circuit Court of Scott County, Kentucky, where said prosecution was pending when said petition for removal was filed.

That the death of the said Goebel occurred during the existence of the most intense political excitement, which followed the election for State officers in Kentucky, held in November, 1899; that, at the time of his death, the said Goebel was contesting the right of William S. Taylor to the Governorship of the State, the said Taylor having been actually elected Governor, and duly declared elected, and duly inducted into said office. Also, that at the time of the said Goebel's death, there were pending contests against all of the said Taylor's associate candidates, including the defendant, who had been a candidate for Secretary of State; and all of which said associate candidates had also been duly elected and declared elected, and all of whom had been duly inducted into the State offices for which they had been candidates. That, as a consequence of these contests, political feeling was greatly inflamed and bitter, and intense animosities were excited and fostered; and that such intense political feeling existed against defendant at all of his trials on the aforesaid charge, and yet existed on the part of the adherents of the said Goebel, throughout the State, and, particularly, in Scott County.

That defendant's first trial on said charge was at a special term of the Scott Circuit Court, held in April, 1900, and resulted in a verdict of conviction and a sentence of life imprisonment in the State Penitentiary. That in said trial a great number of veniremen were summoned, from among whom the trial jury was selected, and that, with the exception of three or four Republicans and independent Democrats, all of said veniremen were partisan Goebel Democrats, and known as such, while defendant was, and is, a Republican; that said trial jury was composed entirely of Goebel Democrats, although there were then residing in said Scott County, and qualified for jury service, hundreds of citizens who were Republicans and independent Democrats.

That, in the summoning of said veniremen, all these Republicans and independent Democrats, or practically all, were purposely passed by, in order that defendant might not have a fair trial, and to the end that an unfair, partisan jury might be selected to convict him. That, under the laws of Kentucky, defendant was entitled to fifteen, and the Commonwealth to

five, peremptory challenges. That the sheriff of Scott County, who summmoned said veniremen, as well as all the deputy sheriffs of said county, was a Goebel Democrat. That said veniremen were selected by said sheriff and his said deputies. That, when the regular list or panel of jurors had been exhausted, and while there remained one hundred names of jurors in the jury wheel, although requested by defendant's counsel to draw same from the jury wheel, the trial judge directed the sheriff to summon one hundred veniremen from Scott County, outside of Georgetown. That the one hundred names in said jury wheel had been selected and placed there by impartial jury commissioners before the November election, 1899. That, when the said veniremen appeared in court, in response to the summons of the said sheriff, and while they were seated together in a body, the trial judge, without notice to defendant or to any of his counsel, left the bench and went to said veniremen, and, without swearing them, and not within the hearing of defendant or of his counsel, called up to him the said veniremen, one at a time, and excused such of them from jury service as he saw fit to excuse, without any knowledge on the part of defendant or his counsel as to why the said veniremen, or any one of them, were excused. That this proceeding took place on both days when said special veniremen appeared in court in response to the sheriff's summons.

That an appeal from said judgment of conviction to the Kentucky Court of Appeals was taken, and the judgment reversed by the Appellate Court, at its January term, 1901.

That defendant's second trial took place in said Scott Circuit Court at its October term, 1901, and a verdict of guilty was again returned and the defendant's punishment again fixed at imprisonment for life in the State penitentiary. That, at this trial, in the selection of a trial jury, the same unjust and unlawful discrimination was practiced as that which obtained in the first trial; that, of one hundred and twenty-five veniremen summoned by the sheriff of Scott County, all were partisan Goebel Democrats except three; and that of one hundred and sixty-eight veniremen summoned in the adjoining county of Bourbon, all were partisan Goebel Democrats except three; so that, of the aggregate of two hundred and ninety-three veniremen, two hundred and eighty-seven were partisan Goebel Democrats, and six were Republicans. That this was the fact, notwithstanding that there were at the time, qualified for jury service, many hundreds of citizens in each of said counties who were Republicans and independent Democrats, and not Goebel partisans. That, at said second trial, defendant

objected to the selection of a jury from said veniremen and moved to discharge the entire venire, on the ground that he could not obtain a fair trial from a jury selected therefrom; and filed in support thereof an affidavit setting up in detail the facts attending the summoning of said venire, as well as the reasons why he could not secure a fair trial from a jury so selected. The said affidavit was verified by defendant, and, among other things, in substance, set up the following facts, viz.:

The general conditions of political heat and intense partisanship that attended the State campaign of 1899, and the contests, and the killing of Mr. Goebel which followed; that, as a result of all these things, the political passions of partisans of Mr. Goebel had, by the time of these trials, been greatly deepened and intensified, not only in Scott and Bourbon counties, but throughout the State. That at the October term, 1900, of the Scott Circuit Court, three jury commissioners were appointed by the court to select and place in the jury wheel names of parties for jury service during the year 1901, and that said work was discharged by said commissioners by selecting and placing in said jury wheel the names of two hundred citizens of Scott County for jury service. That at said October term, 1901, there were drawn from said wheel, for the purpose of securing a jury in said case, one hundred and twenty-five names, being all the names remaining after the juries for service at the February and May terms, 1901, of the Scott Circuit Court, had been drawn therefrom. That at the State election in 1900 Scott County cast 2,500 Democratic votes and 2,100 Republicans votes; that of these 2,100 Republican votes, not less than 1,300 were white voters, of equal character, standing, and intelligence with the white voters who voted with the Democratic party at said election. That, notwithstanding these facts, of the said two hundred names so placed in said jury wheel and drawn, as aforesaid, therefrom, only five were Republicans, and all of the remaining names, one hundred and ninety-five, were those of active partisan Democrats and Goebel adherents. That of the five Republicans whose names were so drawn, one was drawn for service at the February term, 1901; another was drawn for service at the May term, 1901, and of the remaining three, two disqualified themselves at said trial by previously formed opinions, and the fifth and last one, after qualification and acceptance on the *voir dire*, was peremptorily challenged by the Commonwealth. That, in consequence, defendant could not get a fair trial from a jury wholly made up of his political opponents and partisans of Mr. Goebel. That the court officers who went to Bourbon

County to summon persons for jury service in said second trial went directly to, and consulted, concerning the summoning of Bourbon County veniremen, with the sheriff of Bourbon County and his deputies, all of whom were also politically opposed to defendant and ardent partisans of Mr. Goebel; and that in the work of selecting and summoning said Bourbon County veniremen, Wallace Mitchell and James Burke, deputy sheriffs of Bourbon County, Joseph Williams, a constable of Bourbon County, and James A. Gibson, a guard for county prisoners in Bourbon County, all of whom were likewise partisan adherents of Mr. Goebel and politically opposed to defendant, acted with said Scott Circuit Court officers; that the said Wallace Mitchell, at the time of the summoning of said Bourbon County veniremen, was the Democratic nominee for sheriff of Bourbon County; that, theretofore, in the fall of 1900, he had acted in summoning the jurors in the case against Henry E. Youtsey, charging him with the same offense as that alleged against defendant, and that, in selecting those jurors, Wallace had stated that he would not summon a single Brown Democrat or Republican for such jury, and that he did not summon any such person. That Bourbon County was, at the time of the said second trial, almost equally divided between the Republicans and Democrats, there being a slight majority in favor of the latter; that, of the Republicans, about three fifths were colored, but that there were many conscientious, fair-minded and reputable (white) citizens of Bourbon County—who were Republicans—who could have been as readily and conveniently summoned, and who could have given to both sides an impartial trial; but that no one of said persons was summoned, with the exception of two men, out of a total venire of ninety-three, the remaining ninety-one veniremen being politically opposed to defendant, and the partisan adherents of Mr. Goebel, and were, for that reason, summoned.

The defendant then proceeded, in said second ground in his petition for removal, to state that, although the statements contained in the affidavit, whose contents have just been detailed, were true, and by the trial court known to be true, he was forced to submit to a trial before a jury composed entirely of Goebel Democrats, the result of said trial being as already stated; that he was declared guilty of the crime charged and sentenced to life imprisonment in the State penitentiary. That from said judgment he prosecuted an appeal to the Kentucky Court of Appeals, and, at its September term, 1902, secured a reversal thereof. That thereupon he was tried for the third time on said charge, at a special term of the Scott Circuit Court, beginning August 3, 1903; that at this trial, of the one hundred and seventy-six veniremen summoned from

Bourbon County, from whom the trial jury was selected, three only, or possibly four, were Republicans, and the remaining one hundred and seventy-three were Goebel Democrats, and for that reason were summoned; when as a matter of fact there were many hundreds of Republicans and independent Democrats in Bourbon County qualified for jury service, but that these were purposely passed by and avoided by the court officers in summoning the veniremen.

That in 1896 there were in Bourbon County 2,600 votes cast for the Republican Presidential ticket, and about 2,300 votes cast for the Democratic Presidential ticket; that in 1899 William S. Taylor, Republican candidate for Governor, received in Bourbon County twenty-seven more votes than were cast for his Democratic opponent, the said William Goebel. That, out of said veniremen so summoned, an impartial jury was not, and could not have been, selected.

That the jury actually selected from these veniremen was composed entirely of Goebel Democrats, with the possible exception that one member was of doubtful politics; and that said jury was composed of Goebel partisans and adherents, without any exception. That, at said third trial, the trial judge of said Scott Circuit Court entered an order directing the sheriff of Scott County to summon two hundred men from Bourbon County for jury service; that defendant's counsel asked the court to admonish the sheriff to summon an equal number of men from each political party; that the court refused this request; that defendant's counsel thereupon requested the court to instruct said sheriff to summon the talesmen as he came to them, regardless of their political affiliations; that this request was also refused.

That said third trial also resulted in a verdict of guilty, and the affixing of the death penalty. That defendant also prosecuted from this judgment to the Kentucky Court of Appeals an appeal, and that said judgment was reversed by that court on December 6th, 1904.

That it was then and there the intention of the Commonwealth of Kentucky to subject defendant to a fourth trial on said charge in said Scott Circuit Court within a short time.

That at each of said three trials, the said facts in relation to the selection of said juries were embraced in affidavits filed in support of challenges to the panel and to the venire, and in objections to the formation of said juries from the veniremen thus summoned; that said facts were also embraced in motions and grounds for new trials filed in defendant's behalf at each of said trials, but that they were disregarded by the court; and that his challenges to the panels, to the venire, and his motions

for new trials, were in each and every instance overruled by the court; that, by reason of Section 281 of the Kentucky Criminal Code, he was denied the right of any exception on said grounds; and that the said Kentucky Court of Appeals on each of said three appeals has decided that no irregularity in the summoning and impaneling of a jury is a reversible error; and that said Court of Appeals is powerless to reverse any judgment of said trial court by reason of such facts; that said Appellate Court has held said Code Section 281, valid; and that such rulings of said Appellate Court are now the law of the State of Kentucky in the case; and that it (said Appellate Court) is powerless, on any future appeal, to reverse any judgment of the trial court in said case by reason of a repetition of all these prejudicial acts and rulings, or for any other irregularity or improper conduct in the formation of a jury, no matter how prejudicial to the substantial rights of defendant same may be; and that said Scott Circuit Court must, in all respects, follow, and is bound by, these rulings of said Appellate Court on all these matters.

For which reasons defendant (appellee) asked for a removal of the prosecution into the United States Circuit Court for trial.

No answer, or other paper, controverting the statements of said petition for removal was filed by the State of Kentucky, and, therefore, its allegations were and are to be taken as true. Dishon vs. C., N. O. & T. P. R. R. Co., 133 Fed. Rep., page 471.

Upon the filing of said petition for removal, counsel for appellee had served on counsel for appellant notice of the motion which they intended to make in said United States Circuit Court on May 8, 1905, to have the said cause docketed in said last-named court, and to have said court assume jurisdiction of and try said cause. (See pages 1 and 2 of the printed record, for said motion, and officer's return of service thereof.)

Thereupon, in said United States Circuit Court, sitting next after the filing of said petition for removal, in London, Kentucky, the following proceedings were had and the following orders were entered in and about said cause, to wit (pp. 2 to 7, printed record):

May Term, Monday May 8, A. D. 1905.

* * * * *

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This day came the defendant, Caleb Powers, by counsel, and tendered to the court a duly certified transcript of the record of the Scott Circuit Court, and moved the court to file the same

herein and to have this prosecution docketed in this court, to which motion the Commonwealth of Kentucky, by counsel, objected, and the court, being advised, overruled said objection of the Commonwealth and ordered that said transcript be filed and the cause docketed herein, which was done, to which ruling of the court the Commonwealth of Kentucky excepted. Then came the Commonwealth of Kentucky, by counsel, and tendered to the court and moved to file the following motion in writing:

"Now comes the Commonwealth of Kentucky and without waiving its objection to the filing of the purported record herein, and not entering its appearance herein for any other or further purpose than to object to the jurisdiction of this honorable court, and for said purpose now asks this honorable court not to take jurisdiction of this cause and to set aside its order permitting the filing of the purported transcript of record herein, and the docketing of said cause, and to allow the courts of the Commonwealth to proceed with the trial of said Caleb Powers, for the following reasons, viz.:

Because the petitioner has failed to comply with the statutes of the United States, made and provided, in that he has failed to procure copies of the process against him, by which he is held in custody in the State court, and all pleadings, depositions, testimony and other proceedings in said cause, and has wholly failed to file such copies in this honorable court, and the
5 record or copy thereof now tendered by said petitioner to this court, as admitted by him through his attorneys in open court at the time of the offering to file said purported transcript of record, does not contain copies of the process against petitioner and of the pleadings, depositions, testimony and other proceedings in said cause, as required by the provisions of the statutes of the United States in such cases made and provided, and without alleging or averring that the clerk of the Scott Circuit Court has refused or neglected to furnish to the petitioner such copies; on the contrary, petitioner, by his counsel, at the time of offering to file said transcript of record, upon objections by the Commonwealth of Kentucky, through counsel, made to this honorable court the following statement:

'MR. HILL (of counsel for petitioner): May it please the court, in the case of Commonwealth of Kentucky *vs.* Caleb Powers, pending in the Scott Circuit Court, I desire to file the record from the State court on a petition for removal.

THE COURT: A transcript of record.

MR. KINKEAD (of counsel for the petitioner): A partial transcript.

MR. HILL: We understand that the clerk has not put everything in the record, although his certificate practically makes a complete transcript.

MR. HILL: Your Honor will notice that the certificate is that the foregoing 141 pages of typewritten matter contain true and exact copies. In fact the record is much larger than this copy, many more things not copied than have been copied. It so happened that the May term of the Scott Circuit Court convened last Monday, just a week ago. Counsel for Caleb Powers thought it best to file a motion and a petition for a removal of the cause at that time. This is the next term of the United States Circuit Court for the Eastern District of Kentucky, and it became and is necessary that we present the record or do the best we can toward furnishing it. Now, we want to suggest to the court and counsel that this transcript does not contain a copy of everything in the case, but we will hereafter, just as soon as we can get it, ask the court to allow us to file a complete transcript.'

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Petitioner, by his counsel, having thus admitted that his failure to comply with the statute of the United States in having a complete transcript of the record of the State court was not because of the failure, neglect, or refusal of the clerk of said court to make a complete transcript of the record, but in order that the petitioner might, by filing a partial transcript before this honorable court on this, the first day of its term, thereby interrupt and suspend further proceedings in the State court. This honorable court cannot and should not permit the docketing of this cause for any purpose or for any time.

2. The court is further asked to set aside the order docketing this cause and the filing of the purported transcript of record herein, because by said transcript itself it is made to appear that said petitioner Powers has waived his right to a transfer to this honorable court by assenting to the jurisdiction of that court and having three separate trials therein, with appeals to the Court of Appeals of Kentucky, in which said court questions now presented to this court for adjudication and revision were adjudicated fully by said court, and by virtue of the provisions of the statutes of the United States authorizing a removal from the State court to this honorable court, petitioner was required to file such application before the trial or final hearing of the cause, and it is now too late.

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3. This court should set aside the order docketing this cause and filing the purported transcript herein, because such transcript of record itself discloses the fact that no general question is or can be made therein so as to give this court jurisdiction, and the said transcript of record discloses the fact that the only two questions claimed by the petitioner to be general

questions, to wit, a refusal to recognize the pardon pleaded in said cause, and the failure of the statute of Kentucky to authorize an appeal from the decisions of the circuit judge to the Court of Appeals of challenges of jurors for cause, have been adjudicated in this cause, both by the Circuit Court and the Court of Appeals of Kentucky, and are now *res adjudicata*, and cannot be revived or adjudicated herein by this honorable court.

4. The court is further asked to set aside the order docketing this cause and the filing of the purported transcript because the said transcript discloses the fact that the State court has not passed on the motion to remove, and has reserved that action until the cause shall be called for trial at the time set, viz.: July 10, 1905."

To which the defendant objected, which objection was overruled and the court thereupon ordered said motion to be filed, which was done, but overruled the same, to which the Commonwealth of Kentucky excepted.

The defendant Powers, by counsel, then stated to the court that by reason of the length of the record in this cause in the Scott Circuit Court it was impossible for the clerk of that court to copy all of said record after the filing of the petition for removal on Wednesday, May 3, 1905, by this day, to wit, May, 8, 1905, and thereupon the court granted to said Powers until June 8, 1905, in which to complete said transcript of record and file the same herein, to which the Commonwealth of Kentucky excepted. Thereupon the defendant moved the court to direct the clerk of this court to issue a writ of *habeas corpus cum causa* directing the marshal of this court to bring the body of the defendant, Caleb Powers, into the custody of this court, on which motion the court takes time; thereupon the further hearing of this cause was, on motion of the defendant, Caleb Powers, postponed until Thursday, June 8, 1905, at Maysville, Kentucky: to which ruling of the court the Commonwealth of Kentucky excepted.

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Afterwards, on May 11, 1905, an order was, by said United States Circuit Court, entered in said cause, as follows (see pp. 7 and 8 of printed record):

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vs.
CALEB POWERS.

It is ordered on the court's own motion that so much of the order made herein on a former day of this term as fixes the further hearing of this cause at Maysville, Kentucky, on June 8, 1905, in so far as it fixes the hearing at Maysville, Kentucky, be and same is hereby set aside.

The transcript referred to in the foregoing order and filed by order of court on May 8, 1905, is set out in the printed record herein, pages 8 to 224.

On a day following, to wit, on June 8, 1905, there were tendered to said United States Circuit Court, and offered to be filed by counsel for appellee, certain affidavits, made by Chas. Emory Smith, John W. Davis, Jos. K. Dixon, Wm. S. Taylor, J. W. Pruett and J. W. Griggs (said affidavits are set forth on pages 225 to 240 of the printed record).

Afterwards, on June 8, 1905, there was entered by said United States Circuit Court, in said cause, an order as follows (p. 240, printed record):

COMMONWEALTH OF KENTUCKY,
vs.
CALEB POWERS.

This day, this cause coming on to be heard upon the motion of defendant for a writ of *habeas corpus cum causa*, the plaintiff objecting thereto, came counsel for the respective parties and made argument to the court upon said motion. It being impossible to conclude the argument at the present session of the court, it is now ordered that its further hearing be and same is continued until Friday, June 9, 1905, at 9 a. m.

Afterwards, on June 9, 1905, an order was entered in said cause by said United States Circuit Court, as follows (p. 240, printed record):

COMMONWEALTH OF KENTUCKY,
vs.
CALEB POWERS.

This day again came the parties plaintiff and defendant by their respective attorneys, and the further hearing of the argument upon the pending motion being concluded, the court not being duly advised, takes time; said motion is submitted and both sides are given leave to file "memo." of authorities or briefs.

Afterwards, on June 12, 1905, a certain affidavit of George B. Cortelyou was tendered to said United States Circuit, in

said cause (see pp. 240 and 241 of said printed record for said affidavit).

Afterwards, on July 7, 1905, the following order (that herein appealed from) was entered by said United States Circuit Court in said cause (see pp. 241 and 242, printed record):

COMMONWEALTH OF KENTUCKY,
vs.
CALEB POWERS.

This cause came on to be heard on the motion of the defendant, Caleb Powers, for a writ of *habeas corpus cum causa* and was argued by counsel for Powers and by counsel for the Commonwealth and was submitted to the court, on consid-
690 eration whereof said motion is granted for the reasons set forth in the written opinion which is filed herein and made a part of the record; and it is ordered that the clerk issue a writ of *habeas corpus cum causa* commanding the jailor of Scott County to deliver said Caleb Powers into the custody of the marshal of this court, and said marshal is directed to keep said Powers confined in the county jail of Campbell County at Newport, until further order of this court.

The opinion of said United States Circuit Court referred to in said last-recited order is to be found in the printed record, pages 242 to 288.

On the said 7th day of July, 1905, the writ of *habeas corpus cum causa*, in the aforesaid order was duly issued by the clerk of said United States Circuit Court, and was thereupon duly executed by the marshal of said court. Said writ and the said marshal's return thereon are as follows (pp. 288 and 289 printed record):

United States Circuit Court, Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY,
vs.
CALEB POWERS.
} Order.

This cause came on to be heard on the motion of the defendant, Caleb Powers, for a writ of *habeas corpus cum causa*, and was argued by counsel for Powers and by counsel for the Commonwealth, and was submitted to the court, on consideration whereof said motion is granted for the reasons set forth in the written opinion which is filed herein and made a part of the record; and it is ordered that the clerk issue a writ of *habeas corpus*

cum causa commanding the jailer of Scott County to deliver said Caleb Powers into the custody of the marshal of this court, and said marshal is directed to keep said Powers confined in the county jail of Campbell County at Newport, until further order of this court.

UNITED STATES OF AMERICA,
Eastern District of Kentucky, } *ss.:*

I, Jos. C. Finnell, clerk of the United States Circuit Court for the Sixth Judicial Circuit and Eastern District of Kentucky, at London, do hereby certify that the foregoing is a true and correct copy of an order entered and filed herein, in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said court, at London, this 8th day of July, A. D. 1905, and of our Independence the 130th year.

[SEAL.] Jos. C. FINNELL, Clerk.

772 UNITED STATES OF AMERICA,
Eastern District of Kentucky. }

To the Jailor of Scott County, Kentucky.

We command you that the body of Caleb Powers, in your custody detained, be delivered to S. G. Sharp, U. S. marshal for the Eastern District of Kentucky, as provided by an order this day made and entered by the United States Circuit Court for said district, to be dealt with in said court as provided in said order and according to law.

Witness the Hon. A. M. J. Cochran, judge of the U. S. Circuit Court, this 7th day of July, A. D. 1905.

[SEAL.] Jos. C. FINNELL, Clerk.

Upon said writ appears the return of the United States marshal, which return was and is in words and figures as follows, to wit:

Received the within order at Covington, Kentucky, July 8, 1905. Executed same by delivering a copy of said order to George S. Robinson, clerk of the Scott Circuit Court at Georgetown, Kentucky, also one copy of same to Joe Finley, jailer of Scott County, at Georgetown, Kentucky, and further by delivering to Bernard Ploeger, jailer, in Newport, Kentucky, the body of the within named, Caleb Powers, this 10th day of July, 1905.

S. G. SHARP,
U. S. Marshal.

Afterwards, on said 7th day of July, 1905, and after the entry of the aforesaid order granting and directing the issual of said writ of *habeas corpus cum causa*, the appellant, filed in said United States Circuit Court, a petition for appeal to this Honorable Court and assignment of error herein, as follows (p. 290, printed record):

Circuit Court of the United States, Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, vs CALEB POWERS.	Petition for Appeal and Assignment of Error.

The Commonwealth of Kentucky prays an appeal, to the Supreme Court of the United States from the order of the court granting a writ of *habeas corpus* to take the custody of Caleb Powers from the Circuit Court of Scott County, Kentucky, solely upon the question of the jurisdiction of this court as a court of the United States to make said order and to issue said writ, and she assigns as error that this court was without jurisdiction because the petition for removal does not state a case authorizing the removal of the prosecution from the State court into the Federal court and that this court was without authority under the Constitution and laws of the United States to assume jurisdiction of said prosecution or to take the custody of said Powers from the State court, and she prays that said question of the jurisdiction of this court as a court of the United States to make said order granting said writ of *habeas corpus* may be certified to the Supreme Court of the United States.

N. B. HAYS,
Attorney General.

Thereupon, on said 7th day of July, 1905, said United States Circuit Court, made and entered herein an order allowing said appeal as prayed for and certifying the question of jurisdiction herein involved, as follows (pp. 290 and 291, printed record):

Circuit Court of the United States, Eastern District of Kentucky.

COMMONWEALTH OF KENTUCKY, vs. CALEB POWERS.	Order Allowing Appeal and Certifying Question of Jurisdiction.

Upon consideration of the petition of the Commonwealth of Kentucky for an appeal to the Supreme Court of the United States from the order of this court granting a writ of *habeas*

corpus to take the custody of Caleb Powers from the State court, it is hereby certified that the question of the jurisdiction of this court as a court of the United States to make said order was raised by the Commonwealth of Kentucky at the hearing of the petition of said Powers for said order and was in issue, the Commonwealth claiming that the petition for removal does not state a case authorizing the removal of the prosecution from the State court into the Federal court, and that this court was without authority under the Constitution and laws of the United States to assume jurisdiction of said prosecution or to take the custody of said Powers from the Scott Circuit Court; and the said objection of the Commonwealth of Kentucky to the jurisdiction of this court as a court of the United States to make said order or issue said writ was overruled and the writ ordered to be issued; and the court hereby in open court allows an appeal to the Supreme Court of the United States solely upon said question of the jurisdiction of this court as a court of the United States to make said order granting said writ of *habeas corpus*, and said question of the jurisdiction of this court is hereby certified to the Supreme Court of the United States.

775 The appeal bond is fixed at $500.00.

A. M. J. COCHRAN, Judge.

July 7, 1905.

Afterwards, on July 25, 1905, there was filed in said United States Circuit Court and approved by the judge thereof an appeal bond herein executed for the appellant (see same on page 291 of printed record).

Afterwards, on July 31, 1905, a citation, addressed to appellee, commanding him to appear in this Honorable Court and answer said appeal was issued by the district judge of said Eastern District of Kentucky, and service of same was accepted on August 3, 1905, by counsel for appellee (see p. 202 of printed record).

The foregoing includes all the orders and proceedings made and taken in said cause from the filing of said petition for removal until the appeal herein was granted and the question of jurisdiction was herein certified by said United States Circuit Court, as already set out.

CALEB POWERS.